

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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CALIFORNIA STATE OUTDOOR
ADVERTISING ASSOCIATION, INC.,
a California corporation, et
al.,

NO. CIV. S-05-0599 FCD/DAD

Plaintiffs,

v.

MEMORANDUM AND ORDER

STATE OF CALIFORNIA,
DEPARTMENT OF TRANSPORTATION,
WILL KEMPTON, in his official
capacity as Director,
CALIFORNIA DEPARTMENT OF
TRANSPORTATION, and DOES 1-50
inclusive,

Defendants.

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This matter is before the court on motion for partial
summary judgment filed by defendants State of California
Department of Transportation and Will Kempton, Director of the
California Department of Transportation (collectively
"Caltrans"), and motion for partial summary judgment filed by

1 plaintiffs, California Outdoor Advertising Association, Inc., and
2 its members, Arcturus Outdoor Advertising, Bulletin Displays,
3 LLC, Clear Channel Outdoor, Inc., Fairway Outdoor Advertising,
4 Inc., Edwards Outdoor Signs, General Outdoor Advertising, Inc.,
5 Heywood Company Outdoor, James N. Hoff doing business as Hoff
6 Outdoor Advertising, Hunter Media, Lamar Central Outdoor, Inc.,
7 J. R. Zukin Corporation doing business as Meadow Outdoor
8 Advertising, Sun Outdoor Advertising, Stott Outdoor Advertising,
9 Titan Advertising, United Outdoor Advertising, Van Wagner
10 Communications, Inc., and Viacom Outdoor, Inc. (collectively
11 "CSOAA"). The court held a hearing on the motions August 26,
12 2005.^{1, 2}

13 After considering the memoranda filed by the parties and
14 arguments made by counsel at the hearing, and for the reasons
15 stated herein, the court GRANTS plaintiff's motion for summary
16 judgment and DENIES defendants motion for summary judgment.

17 **BACKGROUND**

18 Caltrans, a department of the State of California, regulates
19 outdoor advertising pursuant to the Outdoor Advertising Act,
20 California Business & Professions Code § 5200 et seq. ("OAA") and
21 regulations promulgated by Caltrans pursuant to the OAA. (Defs.'
22 Response to Pls.' Sep. Statement of Und. Facts ("RUF") ¶ 5.)

23
24 ¹ Because oral argument will not be of material
25 assistance, the court orders the matter submitted on the briefs.
E.D. Cal. Local Rule 78-230.

26 ² The court strikes from the record the Surreply and
27 objections to certain declarations submitted by defendants
28 (docket numbers 28 and 29) filed by plaintiffs on August 22, 2005
as improper and untimely under the Eastern District Local Rule
78-230.

1 The OAA requires that any person operating an outdoor
2 advertising display in California referred to herein as "sign" or
3 "billboard") obtain a permit ("Billboard permit") issued by the
4 director of Caltrans or his authorized agent, which must be
5 renewed every five years. Cal Bus. & Prof. Code §§ 5350,
6 5360(a); RUF ¶ 7. Prior to January 1, 2003, the fee for
7 obtaining a Billboard permit was set by statute, California
8 Business and Professions Code section 5485(a), at \$20.00 per year
9 for each billboard. (RUF ¶ 8.) Under regulations effective in
10 2002, billboard operators were required to pay the annual \$20.00
11 permit fee for 2003 on or before December 31, 2002. (RUF ¶ 10.)

12 Effective January 1, 2003, the Legislature amended section
13 5485(a), which now provides that the Director of Caltrans shall
14 set the Billboard permit fee:

15 (a)(1) The annual permit fee for each advertising
16 display shall be set by the director.

17 (2) The fee shall not exceed the amount reasonably
18 necessary to recover the cost of providing the service
19 or enforcing the regulations for which the fee is
20 charged, but in no event shall the fee exceed one
21 hundred dollars (\$100). This maximum fee shall be
increased in the 2007-08 fiscal year and in the 2012-13
fiscal year by an amount equal to the increase in the
California Consumer Price Index.

(3) The fee may reflect the department's average cost,
including the indirect costs, of providing the service
or enforcing the regulations.

22 Cal. Bus. & Prof. Code § 5485(a).

23 On or about June 2, 2003, Caltrans announced a new annual
24 permit renewal fee of \$92.00, which Caltrans indicated it
25 promulgated pursuant to newly-amended section 5485(a). At or
26 around the same time, Caltrans notified permit holders that they

1 were required to pay within thirty days³ an additional \$72.00 per
2 billboard for their 2003 permits or the permits would be revoked
3 pursuant to California Business and Professions Code § 5463 .⁴
4 (RUF ¶ 11.)

5 In setting the new Billboard permit fee, Caltrans did not
6 follow the rulemaking provisions of the Administrative Procedures
7 Act, California Government Code section 11340, et seq. ("APA").
8 According to Caltrans, setting of the Billboard permit fee falls
9 within an exception to the APA for "regulations establishing
10 rates, prices or tariffs." Cal. Gov't Code § 11340.9(g); RUF ¶¶
11 8.)

12 Instead, Caltrans calculated the new Billboard permit fee by
13 "taking the total costs of its Outdoor Advertising
14 Program ("ODA") of \$1,273,824.00 minus projected
15 revenues of \$190,000.00 to give an annual net program
16 cost of \$1,083.824.00. This net costs was divided by
17 the number of permits, 11850, to give an annual permit
cost of \$92.00. The breakdown of costs and revenues in
arriving at the \$92 permit fee are provided in the ODA
Expenditure Summary Data Sheet and related documents."
(RUF ¶ 19; Caltrans' response to CSOAA's Interrogatory No. 1.)

18 Plaintiffs filed their original complaint with the Los
19
20
21

22 ³ According to Caltrans, it extended the thirty-day
23 period to sixty days on July 17, 2003.

24 ⁴ California Business and Professions Code § 5463
25 provides in relevant part: "The director may revoke any license
26 or permit for the failure to comply with this chapter and may
27 remove and destroy any advertising display placed or maintained
28 in violation of this chapter after 30 days written notice is
forwarded by mail to the permitholder at his or her last known
address. If no permit has been issued, a copy of the notice shall
be forwarded by mail to the display owner, property owner, or
advertiser at his or her last known address."

1 Angeles County Superior Court.⁵ On November 29, 2004, plaintiffs
2 filed a First Amended Complaint asserting four claims: (1)
3 violation of the APA; (2) violation of California Business and
4 Professions code section 5485(a); (3) violation of Article I,
5 §2(a) of the California Constitution protecting liberty of
6 speech; and (4) against defendant Kempton only, a claim under 42
7 U.S.C. § 1983 for violation of plaintiff's First Amendment
8 rights.

9 On January 5, 2005, defendants removed the action to the
10 United States District Court for the Central District of
11 California. Defendants subsequently filed a motion for change of
12 venue which was granted by order dated March 14, 2005. The case
13 was transferred to this court on March 24, 2005.

14 On June 7, 2005 defendants filed a motion for partial
15 summary judgment on plaintiffs' first claim for violation of the
16 APA. On July 12, 2005 plaintiffs filed a cross motion for
17 partial summary judgment as to the validity of the permit fee.

18 **STANDARD**

19 Pursuant to Rule 56 of the Federal Rules of Civil Procedure,
20 summary judgment is appropriate when "there is no genuine issue
21 as to any material fact and . . . the moving party is entitled to
22 judgment as a matter of law." Fed. R. Civ. P. 56(c). Under this
23 standard, an issue is "genuine" if there is sufficient evidence
24 for a reasonable jury to find for the nonmoving party and a fact
25 is "material" when it may affect the outcome of the case under
26 the substantive law that provides the claim or defense. Anderson

27 ⁵ The court cannot locate in the file the date plaintiffs
28 filed the original complaint.

1 v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). The
2 determination is made based solely upon admissible evidence. Orr
3 v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002).
4 Furthermore, the court must view inferences made from the
5 underlying facts in the light most favorable to the nonmoving
6 party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970).

7 The moving party has the initial burden to demonstrate the
8 absence of a genuine issue of material fact. Celotex Corp. v.
9 Catrett, 477 U.S. 317, 323 (1986). If the moving party is
10 without the ultimate burden of persuasion at trial, it may either
11 produce evidence negating an essential element of the opposing
12 party's claim, or demonstrate that the nonmoving party does not
13 have enough evidence to carry its ultimate burden of persuasion
14 at trial. Nissan Fire & Marine Insurance Co. v. Fritz Companies,
15 Inc., 210 F.3d 1099, 1106 (9th Cir. 2000). If the moving party
16 meets this initial requirement, the burden then shifts to the
17 opposing party to go beyond the pleadings and set forth specific
18 facts that establish a genuine issue of material fact remains for
19 trial. Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 475
20 U.S. 574, 585-87 (1986). Summary judgment should not be granted
21 where "there are any genuine factual issues that properly can be
22 resolved only by a finder of fact because they may reasonably be
23 resolved in favor of either party." Anderson, 477 U.S. at 250.

24 Following this same rubric, a court may grant summary
25 adjudication on part of a claim or defense, based on the
26 standards applicable to a motion for summary judgment. See Fed.
27 R. Civ. P. 56(a), (b); State of California v. Campbell, 138 F.3d
28 772, 780 (9th Cir. 1998).

ANALYSIS**I. Violation of the APA**

The sole question presented here is whether Caltrans was required to adhere to the procedural requirements of APA in setting the Billboard permit fee.⁶ According to Caltrans, the APA's exemption for "regulations establishing rates, prices or tariffs" applies to the setting the Billboard permit fee. See Cal. Gov't Code § 11340.9(g). Plaintiffs dispute that the "rates, prices or tariffs" exception applies to the Billboard permit fee.

"The task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself." United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989); Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984). The Supreme Court describes this rule as the "one, cardinal canon before all others." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992). Thus, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Id. (citing, Ron Pair, 489 U.S. at 241-242; United States v. Goldenberg, 168 U.S. 95, 102-03 (1897)). When the language of the statute is plain, the inquiry also ends with the language of the statute, for in such instances "the sole function of the courts is to enforce [the statute] according to its terms." Ron Pair, 489 U.S. at 241 (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)); Melahn v. Pennock Ins., Inc.,

⁶ Parties do not dispute that the permit fee is a "regulation" within the meaning of the APA.

1 965 F.2d 1497, 1502 (8th Cir. 1992) (plain meaning of a statute
2 governs over ambiguous legislative history).

3 California Government Code section 11340.9(g) provides:⁷

4 This chapter does not apply to any of the
5 following:

6

7 (g) A regulation that establishes or fixes rates,
8 prices, or tariffs. . . .

9 Initially, the court notes that the word "fee" is not used
10 in the statute. Under the canon of construction, *expressio unius*
11 *est exclusio alterius*, the mention of one thing in a statute
12 impliedly excludes another. By including a list of exceptions
13 for "rates", "prices" and "tariffs," the legislature implicitly
14 excluded fees.

15 ⁷ The other exceptions contained in section 11340.9 are:
16 (a) An agency in the judicial or legislative branch of the state
17 government.

18 (b) A legal ruling of counsel issued by the Franchise Tax Board
19 or State Board of Equalization.

20 (c) A form prescribed by a state agency or any instructions
21 relating to the use of the form, but this provision is not a
22 limitation on any requirement that a regulation be adopted
23 pursuant to this chapter when one is needed to implement the law
24 under which the form is issued.

25 (d) A regulation that relates only to the internal management of
26 the state agency.

27 (e) A regulation that establishes criteria or guidelines to be
28 used by the staff of an agency in performing an audit,
investigation, examination, [etc., which would disclose material
to the violator and facilitate violation of the law].

(f) A regulation that embodies the only legally tenable
interpretation of a provision of law.

(h) A regulation that relates to the use of public works,
including streets and highways, when the effect of the regulation
is indicated to the public by means of signs or signals or when
the regulation determines uniform standards and specifications
for official traffic control devices pursuant to Section 21400 of
the Vehicle Code.

(I) A regulation that is directed to a specifically named person
or to a group of persons and does not apply generally throughout
the state.

1 The term "fee" is used extensively throughout the California
 2 code. In light of this ubiquitous term, it seems likely that
 3 the legislature would have expressly referenced "fees" within
 4 this statute had it intended the exemption to apply to fees.⁸
 5 Interestingly, in other statutes, the legislature did include
 6 both the terms "fees" and "rates", indicating that, when it
 7 intended to include fees, it the legislature expressly so
 8 provided. See e.g., Cal. Gov't Code § 6557 ("Said indenture may
 9 include covenants or other provisions relating to the bonds
 10 issued thereunder requiring the entity to fix, prescribe and
 11 collect *rates, tolls, fees, rentals* or other charges . .
 12 ..") (emphasis added); Cal. Educ. Code § 94147 ("The authority
 13 may fix, revise, charge, and collect *rates, rents, fees*, and
 14 charges for the use of and for the services furnished or to be
 15 furnished by each project") (emphasis added).

16 Nor does the court agree with defendants' argument that the
 17 terms "fee" and "rate," or alternatively "fee" and "price" are
 18 synonymous. The common meanings of these terms are quite
 19 distinct.

20 Black's law dictionary defines "rate" as "proportional or
 21 relative value, measure or degree. The proportion or standard by
 22 which quantity or value is adjusted.. . . Amount of charge or
 23

24 ⁸ In fact, the term "fee" appears in the same 1945
 25 statute (different section) that added the "rate or tariffs"
 26 exception to the APA. See Stats. 1945 c. 111 p. 445; Guarantee
 27 Title & Trust Co. v. Title Guaranty & Surety Co., 224 U.S. 152,
 28 159-160 (1912) (where different language is used in different
 parts of a statute, it is presumed that the language is used with
 a different intent); see also 73 AM. JUR. 2d Statutes § 131 (May,
 2005).

1 payment with reference to some basis of calculation. A certain
2 quantity or amount of on thing considered in relation to another
3 thing and used as standard or measure." Black's Law Dictionary
4 at 1261 (Sixth Ed. 1990).

5 By contrast, a "fee" is defined as "a charge fixed by law
6 for services of public officers or for use of a privilege under
7 control of government." Black's Law Dictionary at 614. Unlike a
8 rate, which is measured by reference to something else, a "fee"
9 has a fixed value. A fee is \$20.00. A rate is \$20.00 per hour
10 or \$30.00 per pound. A fee can be set by reference to a rate,
11 but is not synonymous with the term rate.

12 Similarly, "fee" and "price" are not synonymous.⁹ Price is
13 defined as "the cost at which something is obtained. Something
14 which one ordinarily accepts voluntarily in exchange for
15 something else. The consideration given for the purchase of a
16 thing. Amount which a prospective seller indicates as the sum
17 for which he is willing to sell . . . The term may be synonymous
18 with cost and with value as well as with consideration, though
19 prices is not always identical either with consideration."
20 Black's Law Dictionary at 1188-89.

21 Unlike "fee", which refers to the charge for a government
22 privilege, i.e., a permit or license, "price" connotes a sale,
23 purchase or commercial transaction. This connotation is apparent
24 in the references to price setting in the code. See e.g., Cal.
25 Food & Agric. Code § 62062 (authorizing Director of Department of
26 Agriculture to set minimum milk prices); Cal. Educ. Code §

27 ⁹ Defendants do not contend that the permit fee falls
28 under the exception for "tariffs".

1 1249(a) ("The county superintendent of schools may sell
2 publications that he or she produces... . The county
3 superintendent of schools, . . . may fix the price . . . for the
4 sale of any publication produced by him or her."); Cal. Fish & G.
5 Code § 15301 ("The department may sell wild aquatic plants or
6 animals, except rare, endangered, or fully protected species, for
7 aquaculture use at a price approximating the administrative cost
8 to the department for the collection or sale of the plants or
9 animals. The commission shall set this price."); Cal. Gov. Code §
10 9792 (authorizing Department of General Services to sell copies
11 of laws, resolutions and journals "at such price as it may fix").

12 The court thus concludes that the plain meaning of the
13 language in California Government Code section 11340.9(g)
14 excludes fees from the exception. However, even if the language
15 were ambiguous, the legislative history further supports the
16 conclusion that the exception does not cover fees. When added to
17 former Government code section 11380 in 1945, the exception
18 listed only "rates or tariffs."¹⁰ See Stats. 1945 c. 111 p. 445
19 § 3 ("As used in this chapter: . . . (b) 'Regulation' includes
20 any rule or regulation made by any state agency except one which:
21 (2) establishes or fixes rates or tariffs."). In 1949, the
22 legislature added the term "prices" to the section 11380,
23 presumably because the terms "rates" and "tariffs" have unique
24 definitions which do not encompass "prices". See Stats. 1949 c.

25
26 ¹⁰ The earlier versions of this provision, originally
27 codified as Government Code section 11380, provide no definition
28 of the terms "rates," "prices" or "tariffs", nor did a search of
archival documents reveal any explication of the terms or
discussion of the purpose of the 1949 amendment. See Stats. 1949
c. 313 § 2 p. 601.

313 § 2 p. 601. If the legislature felt compelled to add the word "prices" because "prices" were not encompassed within the terms "rates" and "tariffs," logic suggests that the terms "rates" and "tariffs" also do not encompass other different terms, such as "fees".

The court also notes that Caltrans has followed the Administrative Procedures Act when promulgating regulations establishing permit fees in other contexts.¹¹ plaintiff cites two examples where Caltrans itself followed the APA in setting fees. See 4 C.C.R. § 2424 (describing late renewal process and setting penalty fees); 21 C.C.R. § 2114 (establishing permit fees and other fees for placement of business names on roadside signs placed in rural areas to alert motorists to nearby services). In addition, plaintiffs identify numerous examples where other agencies established fees in conformity with the APA. See e.g., 2 C.C.R. § 2202(c)(2) (\$1.00 per acre permit fee for prospecting); 10 C.C.R. § 2604.02(B) (\$35.00 application fee for pre-organization permit to organize insurance company; 10 C.C.R. § 225 (fees relating to real estate appraisers); 14 C.C.R. § 13055 (fees for processing permit applications for approval by coastal

¹¹ Caltrans and other agencies' conduct in setting other fees is of little relevance to the court's interpretation of the statute. From the materials provided by the parties, the court cannot conclude that agencies consistently establish fees in compliance with the APA. However, the court includes reference to the above cited examples to demonstrate an apparent inconsistency between Caltrans' position that fees fall within section 11340.9(g) exception and its own conduct in setting other fees in compliance with the APA, and also to defeat any suggestion that requiring agencies to comply with the APA in setting fees would place an undue burden on agencies, since it appears that at least in some instances agencies do comply with the APA in setting fees.

1 commission); 12 C.C.R. § 676(b) (9) (B) (\$200.00 permit fee fore
2 fallow deer farming).¹²

3 Defendant distinguishes these regulations on the ground
4 that, unlike here, where the regulation involved solely the
5 setting of a fee with statutory guidance provided by the
6 legislature, these permit fees were part of a broader regulation
7 adopting a process. However, defendants' argument ignores the
8 statutory requirement that Caltrans adopt regulations
9 establishing the process for permit renewal. California Business
10 and Professions Code section 5630 provides:

11 (a) The director shall establish a permit renewal term
12 of five years, which shall be reflected on the face of
13 the permit. (b) The director shall adopt regulations
14 for permit renewal that include procedures for late
renewal within a period not to exceed one year from the
date of permit expiration. Any permit that was not
renewed after January 1, 1993, is deemed revoked.

15 Pursuant to that authority, Caltrans promulgated 4 C.C.R. §
16 2424, which sets forth the process for permit renewal and payment
17 of the fee. While the statutory authority for setting the
18 Billboard permit fee appears in a different code section, it is
19 nonetheless part of a broader permit renewal process. Thus, it
20 is indistinguishable from the other permit fees cited by
21 plaintiff.

22 In support of its position that the permit fee falls within
23 the "rates, prices and tariffs" exception, defendants rely on a
24 1961 California Court of Appeals case, Estate of Setzer, 192 Cal.
25 App. 2d 634 (1961). Neither Setzer, nor any other reported case
26 addresses whether "fees" fall within the "rates, prices or

27 ¹² The court grants plaintiffs' request for judicial
28 notice of the regulations cited.

tariffs" exception.¹³ Setzer involved a challenge to rates fixed by the Director of Mental Hygiene for the maintenance of incompetent individuals in state hospitals. The conservator for an individual committed to a state hospital challenged the Director's increase in the rates for failure to comply with the APA. The district court upheld the rate increase and the appellate court affirmed, holding that:

"the rate determinations made by the director were not required to be filed with the secretary of State nor published in the California Administrative Code or Register since they come within the provisions of [former version of section 11340.9(g)], which excepts from such filing any regulation establishing or fixing rates, prices or tariffs."

Id. at 686. Setzer is distinguishable. First, Setzer involved fixing rates, which expressly falls within the ambit of section 11340.9(g).¹⁴ Moreover, the type of charge involved was a rate

¹³ See California Ass'n of Nursing Homes, Sanitariums, Rest Homes for Aged, Inc. v. Williams, 4 Cal. App. 3d 800 (1970) (concluding that regulation establishing reimbursement rates for MediCal patients in nursing homes did not fall within "rates, prices or tariffs" exception even though it set "rates" because in the authorizing statutes, the scope of the agency's regulations was broader than the exemption); State Compensation Ins. Fund v. McConnell, 46 Cal. 2d 330 (1956) (rating plan for workers' compensation insurance premium fixed by insurance commissioner fell within "rates, prices and tariffs" exception to the APA); Winzler & Kelly v. Department of Industrial Relations, 121 Cal. App. 3d 120, 128 (1981) (determination that field surveyors were covered by wage and hour laws was integral to wage rate-setting and thus exempt from the APA as a regulation fixing rates, prices or tariffs).

¹⁴ Defendants also rely on two opinions by the California Attorney General, 66 Ops. Cal. Atty. Gen. 505 (1983). That opinion held that the Department of Developmental Services could establish a "parental fee schedule" for services provided to developmentally disabled children without complying with the APA. However, the court disagrees with the Attorney General's conclusion that "there appears little doubt but that a parental fee schedule sets 'rates' in common parlance." 66 Ops. Cal. Atty. Gen. 505, 510 (1983). (continued...)

1 charged for a *service*, i.e., maintenance of the committed person
 2 at the mental hospital. Here, the fee does is not charged for a
 3 service but for a government privilege, i.e., the right to erect
 4 a billboard along a highway. It did not involve a regulatory
 5 permit.

6 Finally, defendants argue that the language of California
 7 Business and Professions Code section 5485 reveals legislative
 8 intent to exempt the fee setting from the APA. Specifically
 9 defendants note that the statute itself establishes a "process"
 10 by setting a maximum fee of \$100.00, limiting the fee to the
 11 reasonably necessary to recover the cost of providing the service
 12 or enforcing the regulations for which the fee is charged, and
 13 providing that the fee can include indirect costs of
 14 administering the program. See Cal. Bus. & Prof. Code § 5485.
 15 The court disagrees that the statutory language can be
 16 interpreted to indicate legislative intent to exempt the fee
 17 setting from the APA. The APA applies broadly to agency
 18 regulations. Tidewater Marine Western, Inc. v. Bradshaw, 14
 19 Cal.4th 557, 570 (1996). Specifically the APA provides that

20 [n]o state agency shall issue, utilize, enforce, or
 21 attempt to enforce any guideline, criterion, bulletin,
 22 manual, instruction, order, standard of general
 23 application, or other rule, which is a regulation ...,
 24 unless the guideline, criterion, bulletin, manual,
 instruction, order, standard of general application, or
 other rule has been adopted as a regulation and filed

25 ¹⁴(...continued)

26 Gen. 505. Moreover, the Attorney General's opinion is
 27 distinguishable in that, like Setzer, it involved a government
 28 service, specifically, services for developmentally disabled
 children, and not a regulatory permit. 66 67 Ops. Cal. Atty.
 Gen. 50.

1 with the Secretary of State pursuant to this chapter.
2 Cal Gov't Code, § 11340.5(a). Moreover, the APA provides that
3 its provisions "shall not be superseded or modified by any
4 subsequent legislation except to the extent that the legislation
5 shall do so expressly." Cal. Gov't Code, § 11346. The
6 limitations on the permit fee contained in section 5485 do not
7 constitute an express exemption from the APA.¹⁵ Thus, the APA
8 applies.

9 **CONCLUSION**

10 For the foregoing reasons, plaintiffs' motion for partial
11 summary judgment is granted and defendants' motion for partial
12 summary judgment is denied.

13 IT IS SO ORDERED.

14 DATED: August 29, 2005

15 /s/ Frank C. Damrell Jr.
16 FRANK C. DAMRELL, Jr.
17 UNITED STATES DISTRICT JUDGE
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22 ¹⁵ In Alta Bates Hospital v. Lackner, 118 Cal. App. 3d
23 614, the appellate court confronted a challenge to a 10% cutback
24 in MediCal reimbursement rates instituted by the director of the
25 Department of Health Services. The cutback was instituted
26 pursuant to a state statute authorizing the director to make
27 emergency cutbacks when it appeared that there would be a budget
28 shortfall. See Cal. Welf. & Inst. Code § 14120. The court
determined that the legislature did not intend for the director
to comply with the APA because the cutback would be implemented
only in specific, emergency situations, and the delay attendant
to complying with the APA would undermine the efficacy of the
statute. No parallel exigency is present here.